CONCLUSION

Enforcement of North Dakota's water quality standards would compromise not just the navigation industry, but also the larger benefits maintained by navigation flows. Although North Dakota presents the case as one of an $84.7 million recreation industry versus a $6.7 million navigation industry, the reality is quite different. When factoring in the actual benefits to North Dakota ($22 million) and the downstream benefits dependant on navigation flows ($1.3 billion), enforcing North Dakota's water quality standards would wreak havoc on the Basin's economy. NPPD appreciates the opportunity to provide the Court with a more accurate picture of the economic situation in the Basin, and respectfully requests that the Court deny the Petition for want of "compelling reasons."

Respectfully submitted,

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STATE OF NORTH DAKOTA, et al.,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, MONTANA, NEVADA AND SOUTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

Amicus State of South Dakota[1] and other State amici curiae have a legal responsibility under both federal and state law to protect our Nation's waters. Each State has received delegation from the Environmental Protection Agency (EPA) to implement the Clean Water Act (CWA) on behalf of the United States. As part of that delegation, each State has enacted its own corresponding statutes and rules enforcing water quality standards in the Nation's waters. State statutes and rules dovetail with federal water pollution control laws. State laws must, as a matter of federal law, be at least as stringent as the federal Act.

The state laws, as developed through the federal EPA process, are generally enforceable against federal facilities. 33 U.S.C. § 1323(a). The Army Corps of Engineers, the agency responsible for some of the largest dams in the United States, claims to be exempt under a broad reading of 33 U.S.C. § 1371(a).[2]

Resolving the tension between these statutes is of vital interest to the States when considering the pollution that the Corps' huge dams cause and the serious responsibility of the States to control pollution.

Amici States support the Petition for Writ of Certiorari because they share North Dakota's concern that the Eighth

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[1] South Dakota was an Intervenor before the District Court, but only participated as amicus curiae before the Eighth Circuit Court of Appeals. South Dakota is erroneously listed as a respondent in the caption to North Dakota's Petition for Certiorari.

[2] Although the Army Corps of Engineers broadly claims to be exempt, its planning personnel purport to have examined state water quality standards for each of the relevant states and tribes. Most recently, an extensive 15-year water planning effort by the Corps was distilled into nine volumes. *Final Environmental Impact Statement, Master Water Control Manual Missouri River* (Mar. 2004). A full volume was devoted to state and tribal water quality standards. *Id.*, Volume V: Appendix B. The Corps apparently accepts the water quality standards as an arguably important part of its study in planning efforts, but has chosen to take the position that such standards are not applicable.

Circuit's view of broad preemption undermines the important responsibility of the States to implement the CWA.

SUMMARY OF ARGUMENT

The Corps controls the dams for three out of the five largest reservoirs in the United States.[3] They are Missouri River reservoirs, part of "an integrated system providing for flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife" on the Missouri.[4] These reservoirs are only part of the Army Corps of Engineers' vast holdings.[5] Many of its installations are multipurpose facilities like the Missouri River reservoirs that have some navigation component, but other facets as well.

Notwithstanding the multiple purposes of the Corps dams, the Eighth Circuit Court of Appeals has held that the Corps is not required to comply with state water quality standards under the CWA because navigation is "affected." The decision broadly construed a statutory navigation exemption:

> The CWA's preservation of sovereign immunity where the Corps' authority to maintain navigation would be affected and the principles of preemption preclude the enforcement of North Dakota's state water quality standards against the Corps' releases of water from Lake Sakakawea.

In re Operation of the Missouri River System Litigation, 418 F.3d 915, 920 (8th Cir. 2005).

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[3] United States Society of Dams, http://www2.privatei.com/~uscold/uscold_s.html.

[4] March 2004, United States Army Corps of Engineers, Record of Decision, Missouri River Master Water Control Manual Review and Update, http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/recordofdecision.pdf.

[5] http://www.usace.army.mil/commander.html.